contract prohibition were to sunset (wholly or partially), an MVPD would still have the option to file a complaint with the Commission alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming violates these provisions. We note that the Commission currently considers allegedly "unfair acts" involving terrestrially delivered, cable-affiliated programming on a case-by-case basis pursuant to Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules. Applying these provisions, the Commission recently found that the withholding of terrestrially delivered, cable-affiliated RSNs from certain MVPDs in the New York, Buffalo, and Hartford/New Haven DMAs violated these provisions. We seek comment regarding whether there are any justifications for applying different rules and procedures to satellite-delivered, cable-affiliated programming than those that apply to terrestrially delivered, cable-affiliated programming.

49. The Commission previously concluded that Section 628(b) was not an adequate substitute for the prohibition on exclusive contracts under Section 628(c)(2)(D). Among other things, the Commission noted that Section 628(b) "carries with it an added burden" to demonstrate that the "purpose or effect" of the "unfair act" is to "significantly hinder or prevent" an MVPD from providing programming. We seek comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming to reliance instead on a case-by-case process, including Section 628(b) complaints. To what extent would a case-by-case process be more costly for competitive MVPDs than the current prohibition on exclusive contracts? What would be the benefits of eliminating the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming? Would these benefits outweigh the costs of a case-by-case process?

(a) Case-by-Case Complaint Process

50. We note that a case-by-case complaint process alleging a violation of Section 628(b) would differ from the current prohibition on exclusive contracts in Section 628(c)(2)(D) in several important respects. First, under the current exclusive contract prohibition, all exclusive contracts between a cable operator and a satellite-delivered, cable-affiliated programmer pertaining to satellite-delivered, cable-affiliated programming are considered categorically "unfair." If the exclusive contract prohibition were to sunset (wholly or partially), however, exclusive contracts would no longer always be presumed "unfair." Rather, a complainant would have the burden to establish that the exclusive contract at issue is "unfair" based on the facts and circumstances presented. Second, under the current exclusive contract prohibition, all exclusive contracts between a cable operator and a satellite-delivered, cable-affiliated programmer pertaining to satellite-delivered, cable-affiliated programming are presumed to harm

¹⁶² See 2010 Program Access Order, 25 FCC Rcd at 788, ¶ 61 (explaining that Section 628(b) does not contain a sunset provision).

¹⁶³ See supra ¶ 2.

¹⁶⁴ See id. at ¶ 2 n.5.

¹⁶⁵ See also supra ¶ 32.

¹⁶⁶ See 2002 Extension Order, 17 FCC Rcd at 12153-54, ¶ 65 n.206 ("We do not believe other provisions in the statute – namely, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) – are adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D)."); 2007 Extension Order, 22 FCC Rcd at 17796-97, ¶ 6 and 17834-35, ¶ 62 n.320.

¹⁶⁷ 2002 Extension Order, 17 FCC Rcd at 12153-54, ¶ 65 n.206.

¹⁶⁸ See, e.g., Verizon Tel. Cos. et al., 26 FCC Rcd at 13160-77, ¶¶ 18-41 (finding that withholding of the HD versions of the MSG and MSG+ RSNs from Verizon was an "unfair act"), affirmed, 26 FCC Rcd at 15868, ¶ 32, appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC, No. 11-4780 (2nd Cir.).

competition, and competitive MVPDs alleging a prohibited exclusive contract are not required to demonstrate harm. ¹⁶⁹ In alleging that an exclusive contract violates Section 628(b), however, a complainant would have the burden of proving that the exclusive contract has the "purpose or effect" of "significantly hindering or preventing" the MVPD from providing satellite cable programming or satellite broadcast programming. ¹⁷⁰ Third, the current exclusive contract prohibition forbids all exclusive contracts between a cable operator and a satellite-delivered, cable-affiliated programmer pertaining to satellite-delivered, cable-affiliated programming, unless a cable operator or programmer can satisfy its burden of demonstrating that an exclusive contract serves the public interest based on the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules.¹⁷¹ If the exclusive contract prohibition were to sunset (wholly or partially), however, the situation would be reversed. That is, such exclusive contracts would be permitted, unless an MVPD could carry its burden of demonstrating that the exclusive contract violates Section 628(b) (or, potentially, Section 628(c)(2)(B)¹⁷²). We seek comment on the above interpretations of Section 628(b) as it pertains to exclusive contracts involving satellite-delivered, cable-affiliated programming, particularly the practical implications for competitive MVPDs, cable operators, and satellite-delivered, cable-affiliated programmers.

- (b) Extending Rules and Policies Adopted for Section 628(b) Complaints Involving Terrestrially Delivered, Cable-Affiliated Programming to Section 628(b) Complaints Challenging Exclusive Contracts Involving Satellite-Delivered, Cable-Affiliated Programming
- 51. The Commission in the 2010 Program Access Order adopted a case-by-case complaint process to address unfair acts involving terrestrially delivered, cable-affiliated programming that allegedly violate Section 628(b). The doing so, the Commission adopted rules and policies that would appear to be equally appropriate for complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b). Accordingly, if the exclusive contract prohibition were to sunset (wholly or partially), we propose to apply these same rules and policies to such complaints.
- 52. First, the Commission declined to adopt specific evidentiary requirements with respect to proof that the defendant's alleged activities violated Section 628(b).¹⁷⁴ Among other things, the Commission explained that the evidence required to satisfy this burden will vary based on the facts and circumstances of each case and may depend on, among other things, whether the complainant is a new entrant or an established competitor and whether the programming the complainant seeks to access is new or existing programming.¹⁷⁵ In addition, the Commission provided the following illustrative examples of

¹⁶⁹ See supra ¶ 7.

¹⁷⁰ See 47 U.S.C. § 548(b).

¹⁷¹ See 47 U.S.C. § 548(c)(2)(D), (c)(4); 47 C.F.R. § 76.1002(c)(4)-(5); 2002 Extension Order, 17 FCC Rcd at 12153-54, ¶ 65 n.206 ("While Section 628(c)(2)(D) remains in effect, exclusive contracts generally are prohibited unless the Commission finds that exclusivity is in the public interest. The burden is placed on the party seeking exclusivity to show that a specific exclusive contract meets the statutory public interest standard before any such contract can be enforced.") (citing 1993 Program Access Order, 8 FCC Rcd at 3384, ¶ 63 and 3386, ¶ 66).

¹⁷² See infra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

¹⁷³ See 2010 Program Access Order, 25 FCC Rcd at 777-88, ¶¶ 46-61.

¹⁷⁴ See id. at 785-86, ¶ 56.

¹⁷⁵ See id.

evidence that litigants might consider providing: (i) an appropriately crafted regression analysis that estimates what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share; or (ii) statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or not to switch to an MVPD that did not carry the withheld programming. The Commission also explained that the discovery process will enable parties to obtain additional evidence. The exclusive contract prohibition were to sunset (wholly or partially), we propose to apply the same requirements to complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b).

Second, the Commission found that one category of programming, RSNs, was shown by both Commission precedent and record evidence to be very likely to be both non-replicable and highly valued by consumers. 178 Rather than requiring litigants and the Commission staff to undertake repetitive examinations of this RSN precedent and the relevant historical evidence, the Commission instead allowed complainants to invoke a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). The D.C. Circuit upheld the Commission's decision to establish a rebuttable presumption of "significant hindrance" for "unfair acts" involving terrestrially delivered, cable-affiliated RSNs under both First Amendment and Administrative Procedure Act ("APA") review. 180 Accordingly, to the extent the exclusive contract prohibition were to sunset (wholly or partially) and we do not retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs, 181 should we similarly adopt a rebuttable presumption of "significant hindrance" under Section 628(b) for exclusive contracts involving satellite-delivered, cable-affiliated RSNs? If so, we propose to define the term "RSN" in the same way the Commission defined that term in the 2010 Program Access Order. 182 Is there any basis to have a rebuttable presumption of "significant hindrance" for terrestrially delivered, cable-affiliated RSNs, but not when these networks are satellite-delivered? Are there any other categories of satellite-delivered, cable-affiliated programming that can be deemed "must have" and for which we should establish a rebuttable presumption of "significant hindrance"? We note that the Commission in the Comcast-NBCU Order concluded that "certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming." 183 Are there other types of satellite-delivered, cable-

¹⁷⁶ See id.

¹⁷⁷ See id.; see also 47 C.F.R. § 76.1003(j).

¹⁷⁸ See 2010 Program Access Order, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52.

¹⁷⁹ See id. In establishing the RSN rebuttable presumption, the Commission relied on evidence in the record supporting the conclusion that RSNs typically offer non-replicable content and are considered "must have" programming by MVPDs. See id. at 768-69, ¶ 32 and 782-83, ¶ 52 nn.205-206. The Commission also relied on an empirical analysis performed in the Adelphia Order assessing the impact of the withholding of terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. See id. at 768-69, ¶ 32 and 782, ¶ 52 n.202 (citing Adelphia Order, 21 FCC Rcd at 8271, ¶ 149 (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; and concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been); 2007 Extension Order, 22 FCC Rcd at 17818-19, ¶ 40 and 17876-82, Appendix B (addressing comments concerning the Adelphia Order study)).

¹⁸⁰ See Cablevision II, 649 F.3d at 716-18.

¹⁸¹ See infra ¶¶ 72-80.

¹⁸² See supra n.99.

¹⁸³ Comcast/NBCU Order, 26 FCC Rcd at 4258, ¶ 46.

affiliated programming besides RSNs that have no good substitutes, are important for competition, and are non-replicable, as the Commission has found with respect to RSNs?¹⁸⁴ To the extent that commenters contend that there are, we ask that they provide reliable, empirical data supporting their positions, rather than merely labeling such programming as "must have." In addition, we request commenters to provide a rational and workable definition of such programming that can be applied objectively.

54. Third, the Commission concluded that HD programming is growing in significance to consumers and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content. Accordingly, the Commission determined that it would analyze the HD version of a network separately from the SD version of similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b). Thus, the fact that a respondent provides the SD version of a network to the complainant will not alone be sufficient to refute the complainant's showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b). Similarly, in cases involving an RSN, withholding the HD feed is rebuttably presumed to cause "significant hindrance" even if an SD version of the network is made available to competitors. The D.C. Circuit upheld the Commission's decision on this issue under both First Amendment and APA review. To the extent the exclusive contract prohibition were to sunset (wholly or partially), we believe the same requirements should apply to complaints alleging that an exclusive contract involving satellite-delivered, cableaffiliated programming violates Section 628(b). We seek comment on this proposal.

(c) Additional Rules for Complaints Challenging Exclusive Contracts Involving Satellite-Delivered, Cable-Affiliated Programming

55. To the extent the exclusive contract prohibition were to sunset (wholly or partially), we seek comment on ways to reduce burdens on both complainants and defendants in connection with complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b) (or, potentially, Section 628(c)(2)(B)¹⁹²). We acknowledge that a case-by-case complaint process for addressing exclusive contracts involving satellite-delivered, cable-affiliated, national programming networks may impose some burdens for litigants and the Commission, especially in comparison to the current broad, prophylactic prohibition. For example, although several MVPDs could join as complainants, the showing in the complaint and any subsequent ruling on the complaint

¹⁸⁴ See supra ¶ 28.

¹⁸⁵ See 2010 Program Access Order, 25 FCC Rcd at 784-85, ¶ 54.

¹⁸⁶ See id. at 784-85, ¶¶ 54-55.

¹⁸⁷ See id. at 784-85, ¶ 54.

¹⁸⁸ See id. at 785, ¶ 55.

¹⁸⁹ See id.

¹⁹⁰ See Cablevision II, 649 F.3d at 716-18.

¹⁹¹ In addition, as discussed below, a defendant answering a complaint alleging an "unfair act" involving terrestrially delivered, cable-affiliated programming is provided with 45 days – rather than the standard 20 days – to file an answer. See 47 C.F.R. § 76.1001(b)(2)(i); 2010 Program Access Order, 25 FCC Rcd at 779-80, ¶ 49. We propose below that the same 45-day answer period apply to all answers to complaints alleging a violation of Section 628(b). See infra ¶ 97.

¹⁹² See infra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

(either grant or denial) will be limited to the complainants. Other competitive MVPDs that are not parties to the complaint would have to file their own complaint and demonstrate how the exclusive contract at issue is "unfair" and has "significantly hindered" them from providing programming. Given the number of competitive MVPDs nationwide that might seek access to a satellite-delivered, cable-affiliated, national programming network that is subject to an exclusive contract with cable operators, the number of such complaints involving just one national network could be significant.

- 56. We seek comment on how to reduce these potential burdens for both complainants and defendants. For example, rather than requiring litigants and the Commission staff to undertake repetitive examinations of the same network, we seek comment on whether the Commission could establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a satellite-delivered, cable-affiliated programming network violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b) (or Section 628(c)(2)(B)). We seek comment on whether adoption of such a rebuttable presumption is rational. For example, in the event the Commission finds that an exclusive contract violates Section 628(b) (or Section 628(c)(2)(B)) in response to a complaint brought by a small, fledgling MVPD, is it rational to assume that the Commission is likely to reach the same conclusion when the complaint is brought by a large, established MVPD?
- 57. We also seek comment on whether there would be any benefit to retaining post-sunset our existing process whereby a cable operator or a satellite-delivered, cable-affiliated programmer may file a Petition for Exclusivity seeking Commission approval for an exclusive contract involving satellite-delivered, cable-affiliated programming by demonstrating that the arrangement serves the public interest based on the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules. While a cable operator post-sunset would be permitted generally to enter into an exclusive contract with a satellite-delivered, cable-affiliated programming network without receiving prior Commission approval, we propose that the grant of a Petition for Exclusivity would immunize such an exclusive contract from potential complaints alleging a violation of Section 628(b), as well as Section 628(c)(2)(B). We further propose that, to the extent we were to deny a Petition for Exclusivity post-sunset, the petitioner would not be precluded from entering into or enforcing the exclusive contract subject to the petition. Rather, denial of a Petition for Exclusivity post-sunset would mean that the exclusive contract at issue may not be permissible in all cases if challenged pursuant to Section 628(b) or,

¹⁹³ See Cablevision II, 649 F.3d at 716 (stating that an agency may adopt an evidentiary presumption provided the presumption is "rational" and that "an evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact... until the adversary disproves it") (quoting Nat'l Mining Ass'n v.Dep't of Interior, 177 F.3d 1, 6 (D.C. Cir. 1999) (internal citation and quotation marks omitted)).

¹⁹⁴ See 47 U.S.C. § 548(c)(2)(D), (c)(4); 47 C.F.R. § 76.1002(c)(4)-(5); see also infra ¶ 75 (proposing that, to the extent the Commission retains an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs or other satellite-delivered, cable-affiliated "must have" programming, the Commission would retain existing rules and procedures whereby a cable operator or a satellite-delivered, cable-affiliated programmer can seek prior Commission approval to enter into an exclusive contract by demonstrating that the arrangement satisfies the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules).

¹⁹⁵ See 47 U.S.C. § 548(c)(2)(B)(iv) (providing that it is not a violation of Section 628(c)(2)(B) for a satellite-delivered, cable-affiliated programmer to "enter[] into an exclusive contract that is permitted under [Section 628(c)(2)(D)]"); infra ¶ 61 (explaining that the Commission has interpreted this language to pertain to only those exclusive contracts that have been deemed by the Commission to be in the public interest pursuant to the factors set forth in Section 628(c)(4)).

potentially, Section 628(c)(2)(B). We seek comment on the costs and benefits of retaining this petition process after a sunset, especially whether the burdens for the Commission staff and impacted parties would outweigh any benefits. We also seek comment on any other ways to reduce the potential burdens for both complainants and defendants resulting from a case-by-case complaint process.

(ii) Section 628(c)(2)(B) Discrimination Complaints

58. We believe that discrimination complaints under Section 628(c)(2)(B) also will provide some protection for competitive MVPDs should the exclusive contract prohibition sunset (wholly or partially). Discrimination can take two forms: price discrimination and non-price discrimination. Non-price discrimination includes an unreasonable refusal to license programming to an MVPD. A refusal to license is permissible only if there is a "legitimate business justification" for the conduct. As discussed below, a refusal to license can take two forms. First, a satellite-delivered, cable-affiliated programmer may refuse to license its programming to all MVPDs in a market except for one (such as its affiliated cable operator), thereby providing the affiliated cable operator with exclusive access to the programming. Second, a satellite-delivered, cable-affiliated programmer may selectively refuse to license its programming to certain MVPDs in a market (such as a recent entrant) while licensing the programming to other MVPDs (such as its affiliated cable operator and DBS operators). We seek comment on each of these scenarios below.

(a) Challenging an Exclusive Arrangement as an Unreasonable Refusal to License

59. We seek comment on the interplay between the potential sunset of the exclusive contact prohibition in Section 628(c)(2)(D) and the continued prohibition on unreasonable refusals to license pursuant to Section 628(c)(2)(B). As an initial matter, we note that Section 628(c)(2)(D) prohibits "exclusive contracts... between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest." This language presumes that an agreement will exist between the cable operator and the satellite-delivered, cable-affiliated programmer that would provide the cable operator with exclusivity. In the event that a satellite-delivered, cable-affiliated programmer

¹⁹⁶ See infra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

¹⁹⁷ See 1993 Program Access Order, 8 FCC Rcd at 3364, ¶ 14.

¹⁹⁸ See id. at 3364, ¶ 14 and 3412-13, ¶ 116.

¹⁹⁹ See id. at 3412-13, ¶ 116 ("We believe that the Commission should distinguish 'unreasonable' refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor."); see also Bell Atlantic Video Servs. Co. v. Rainbow Programming Holdings Inc. and Cablevision Sys. Corp., Memorandum Opinion and Order, 12 FCC Rcd 9892, 9899, ¶ 18 (CSB 1997) (finding that defendant cable-affiliated programmer had engaged in impermissible non-price discrimination).

²⁰⁰ 47 U.S.C. § 548(c)(2)(D).

²⁰¹ In Section 628(c)(2)(C), which pertains to exclusivity in areas unserved by cable operators, Congress used broader language than in Section 628(c)(2)(D) to define the prohibited exclusive arrangements. *Compare* 47 U.S.C. § 548(c)(2)(C) (prohibiting in unserved areas "practices, understandings, arrangements, and activities, including exclusive contracts... between a cable operator" and specified programmers) with 47 U.S.C. § 548(c)(2)(D) (prohibiting in served areas "exclusive contracts... between a cable operator" and specified programmers). The Commission's rules, however, define the prohibition on exclusive contracts in served areas as prohibiting a cable (continued....)

unilaterally refuses to license its programming to all MVPDs in a market except for one cable operator and without any exclusive contract with the cable operator, we believe an MVPD can challenge this conduct as an unreasonable refusal to license in violation of Section 628(c)(2)(B). While a cable operator would be permitted generally to enter into an exclusive contract with the satellite-delivered, cable-affiliated programmer in the event of a sunset, the scenario presented here does not involve an exclusive contract; rather, it involves unilateral action by the satellite-delivered, cable-affiliated programmer. We seek comment on this interpretation. In defending against a complaint, the satellite-delivered, cable-affiliated programmer would be required to provide a "legitimate business justification" for its conduct. 202

- 60. In the event that a satellite-delivered, cable-affiliated programmer and a cable operator enter into an exclusive contract post-sunset (complete or partial), we seek comment on whether an MVPD can challenge this exclusive contract as an unreasonable refusal to license in violation of Section 628(c)(2)(B). We believe that there are legitimate arguments for and against this interpretation. We seek comment on which of the interpretations set forth below is more reasonable and consistent with the goals of Section 628.
- 61. In favor of interpreting Section 628(c)(2)(B) to allow a challenge post-sunset to an exclusive contract as an unreasonable refusal to license, we note that Section 628(c)(2)(B)(iv) provides that it is not a violation of Section 628(c)(2)(B) for a satellite-delivered, cable-affiliated programmer to "enter[] into an exclusive contract that is permitted under [Section 628(c)(2)(D)]."²⁰⁴ The Commission has previously interpreted this language to pertain to only those exclusive contracts that have been deemed by the Commission to be in the public interest pursuant to the factors set forth in Section 628(c)(4).²⁰⁵ This provision is silent regarding exclusive contracts that are generally permissible after a sunset pursuant to Section 628(c)(5).²⁰⁶ Does the omission of post-sunset exclusive contracts from both Section 628(c)(2)(D) and Section 628(c)(2)(B)(iv) mean that Congress intended that such contracts might still be challenged as impermissibly discriminatory in violation of Section 628(c)(2)(B)?²⁰⁷ In addition, we note that the exclusive contract prohibition in Section 628(c)(2)(D) applies to exclusive contracts between a satellite-delivered, cable-affiliated programmer and a Cable operator; it does not apply to exclusive contracts between a satellite-delivered, cable-affiliated programmer and a DBS operator.²⁰⁸

²⁰² See supra n.199.

²⁰³ To the extent that we determine that an MVPD can challenge an exclusive contract as an unreasonable refusal to license in violation of Section 628(c)(2)(B) post-sunset, we seek comment above on ways to reduce the potential burdens for both complainants and defendants resulting from a case-by-case complaint process. See supra ¶¶ 56-57.

²⁰⁴ 47 U.S.C. § 548(c)(2)(B)(iv).

²⁰⁵ See 47 U.S.C. § 548(c)(2)(D) (prohibiting specified exclusive contracts "unless the Commission determines (in accordance with [Section 628(c)(4)]) that such contract is in the public interest"); Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, 11 FCC Rcd 18223, 18319, ¶ 185 n.428 (1996) ("We interpret this provision as providing a safe harbor from challenge under Section 628(c)(2)(B)'s discrimination prohibition to exclusive contracts that the Commission has determined to be in the public interest under Section 628(c)(2)(D).") ("1996 OVS Order").

²⁰⁶ See 47 U.S.C. § 548(c)(5).

²⁰⁷ See United States of America v. Davis, 978 F.2d 415, 418 (8th Cir. 1992) (the maxim of statutory construction expressio unius est exclusio alterius (the mention of one thing implies the exclusion of another) dictates that an expressly stated exception impliedly excludes all other exceptions).

²⁰⁸ See 47 U.S.C. § 548(c)(2)(D); 1996 OVS Order, 11 FCC Rcd at 18320-21, ¶ 187 ("[I]n order for an exclusive contract to be prohibited under Sections 628(c)(2)(C) and 628(c)(2)(D) of the Communications Act and Section 76.1002(c) of the Commission's rules, the exclusive agreement must involve a cable operator (or, following the (continued....)

Both before and after a sunset, however, the decision of a satellite-delivered, cable-affiliated programmer to license its programming to a DBS operator but not to other MVPDs might be challenged as an unreasonable refusal to license pursuant to Section 628(c)(2)(B). 209 If, post-sunset, an MVPD cannot challenge an exclusive arrangement between a satellite-delivered, cable-affiliated programmer and a cable operator as an unreasonable refusal to license in violation of Section 628(c)(2)(B), would this produce an anomalous result? Specifically, in challenging an exclusive contract between a satellite-delivered, cableaffiliated programmer and a cable operator, an MVPD would have to rely on Section 628(b), which places the burden on the MVPD to demonstrate that the defendant has engaged in an "unfair act" that has the "purpose or effect" of "significantly hindering or preventing" the MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²¹⁰ By contrast, in challenging an exclusive contract between a satellite-delivered, cable-affiliated programmer and a DBS operator, an MVPD could rely on Section 628(c)(2)(B), which presumes harm in every case²¹¹ and places the burden on the satellite-delivered, cable-affiliated programmer to provide a "legitimate business" justification" for its conduct.²¹² Is there any basis for placing a greater burden on an MVPD in challenging an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator than between a satellite-delivered, cable-affiliated programmer and a DBS operator?

62. On the other hand, we note that there are legitimate arguments against interpreting Section 628(c)(2)(B) to allow an MVPD to challenge an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator post-sunset as an unreasonable refusal to license. Currently, with the exclusive contract prohibition in effect, an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator is prohibited, unless the programmer or cable operator can demonstrate that the exclusive contract serves the public interest based on the factors set forth in Section 628(c)(4). If, post-sunset, an MVPD can challenge an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator as an unreasonable refusal to license in violation of Section 628(c)(2)(B), the satellite-delivered, cable-affiliated programmer would be required to demonstrate a "legitimate business reason" for its conduct. Is it reasonable to interpret (Continued from previous page)

1996 Act, a common carrier or its affiliate that provides video programming directly to subscribers, or an open video system operator)."); see also id. at 18318-20, ¶¶ 183-84; Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105, 3127-28, ¶ 42 (1994) ("1994 DBS Order").

²⁰⁹ See 47 U.S.C. § 548(c)(2)(B) (prohibiting discrimination by a satellite-delivered, cable-affiliated programmer in the prices, terms, and conditions of sale or delivery of programming "among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups"); 1993 Program Access Order, 8 FCC Rcd at 3412, ¶ 116 ("one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor"); 1996 OVS Order, 11 FCC Rcd at 18319-20, ¶ 185 ("[W]e also do not intend to foreclose challenges to exclusive contracts between vertically integrated satellite programmers and MVPDs, including unaffiliated MVPDs, on open video systems under Section 628(c)(2)(B), which prohibits, with limited exceptions, discrimination among competing MVPDs by a vertically integrated satellite programmer. In particular, as we found in the [1993 Program Access Order], Section 628(c)(2)(B) covers non-price discrimination such as an unreasonable refusal to deal, including one which might result from an exclusive contract.") (citations and footnotes omitted) and 18325, ¶ 197.

²¹⁰ See 47 U.S.C. § 548(b); see also supra ¶ 48.

²¹¹ See supra n.21.

²¹² See supra n.199.

²¹³ See 47 U.S.C. §§ 548(c)(2)(D), 548(c)(4).

²¹⁴ See supra n.199.

Section 628 to provide that, post-sunset, the public interest factors in Section 628(c)(4) would be replaced with a showing of a "legitimate business reason" in response to a complaint alleging a violation of Section 628(c)(2)(B)? We note that two of the public interest factors in Section 628(c)(4) focus on competition in the video distribution market, allowing a proponent of exclusivity to demonstrate how the exclusive contract will not adversely impact competition. In a complaint alleging discrimination under Section 628(c)(2)(B), however, the alleged discriminatory act is presumed to harm competition in every case. It is it reasonable to interpret Section 628 to provide that, pre-sunset, a satellite-delivered, cable-affiliated programmer or a cable operator could make a showing that an exclusive contract would not adversely impact competition pursuant to the public interest factors in Section 628(c)(4), but, post-sunset, exclusivity is presumed to harm competition in every case when challenged pursuant to Section 628(c)(2)(B)?

63. In addition to the foregoing, we seek comment on whether the legislative history of the 1992 Cable Act supports either of the above interpretations. The Senate Report accompanying the 1992 Cable Act states that the "bill does not equate exclusivity with an unreasonable refusal to deal." This statement might be read to imply that Congress considered exclusive contracts and unreasonable refusals to deal to be mutually exclusive, with the effect that once a satellite-delivered, cable-affiliated programmer enters into an exclusive contract with a cable operator post-sunset, the contract cannot be challenged as an unreasonable refusal to license pursuant to Section 628(c)(2)(B). Another part of the Senate Report, however, states that "the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal." This statement might be read to imply that Congress did not consider exclusive contracts and unreasonable refusals to license to be mutually exclusive, with the effect that an exclusive contract could be challenged as an unreasonable refusal to license pursuant to Section 628(c)(2)(B).

(b) Selective Refusals to License Programming

64. Notwithstanding the question raised in the previous section of whether an MVPD can challenge post-sunset an exclusive arrangement between a satellite-delivered, cable-affiliated programmer and a cable operator as an unreasonable refusal to license in violation of Section 628(c)(2)(B), our rules and precedent establish that the discrimination provision in Section 628(c)(2)(B) would prevent a satellite-delivered, cable-affiliated programmer from licensing its content to MVPD A (such as a DBS operator) in a given market area, but to selectively refuse to license the content to MVPD B (such as a telco video provider) in the same area, absent a legitimate business reason. When a satellite-delivered,

²¹⁵ See 47 U.S.C. § 548(c)(4)(A) (requiring the Commission to consider the effect of the exclusive contract on "the development of competition in local and national [MVPD] markets"); 47 U.S.C. § 548(c)(4)(B) (requiring the Commission to consider the effect of the exclusive contract on "competition from [MVPD] technologies other than cable"); see also New England Cable News Channel, Memorandum Opinion and Order, 9 FCC Rcd 3231, 3235, ¶¶ 30-31 (1994) (finding that New England Cable News ("NECN") channel's exclusive contract with cable operators would not have an effect on competition in local or national video distribution markets that could not be offset by public interest benefits of the exclusive contract); NewsChannel, Memorandum Opinion and Order, 10 FCC Rcd 691, 694, ¶ 21 (CSB 1994) (finding that NewsChannel's exclusive contract with cable operators would not have an effect on competition in the video distribution market).

²¹⁶ See supra n.21.

²¹⁷ S. Rep. No. 102-92 (1991), at 26, reprinted in 1992 U.S.C.C.A.N. 1133, 1161.

²¹⁸ Id

²¹⁹ As the Commission explained in the 2007 Extension Order, "a vertically integrated programmer that withholds programming from a recent entrant with a minimal subscriber base but chooses to offer the programming to all other (continued....)

cable-affiliated programmer discriminates among MVPDs in this manner, it faces the prospect of a complaint alleging non-price discrimination in violation of Section 628(c)(2)(B). As noted above, complaints alleging a violation of Section 628(c)(2)(B) do not require a showing of harm to the complainant. 221

- 65. We seek comment on whether the right of an MVPD to challenge a selective refusal to license as a form of prohibited non-price discrimination under Section 628(c)(2)(B) will help to preserve and protect competition in the video distribution market if the exclusive contract prohibition were to sunset (wholly or partially). As reflected in Appendix A, the two DBS operators together have approximately 34 percent of MVPD subscribers nationwide today. Because a national programming network that refuses to license its content to these MVPDs will forgo significant licensing fees and advertising revenues, is it reasonable to assume that most satellite-delivered, cable-affiliated, national programming networks will license their content to DBS operators? If they do, we interpret Section 628(c)(2)(B) as permitting other competitive MVPDs, such as a telco video provider, to bring non-price discrimination complaints should these programmers refuse to deal with them. How does this analysis change with respect to local and regional markets, where cable operators may have an overwhelming share of the market or a vertically integrated cable operator may pass a large percentage of television households?²²²
- 66. The Commission previously concluded that the discrimination provision in Section 628(c)(2)(B) is not an adequate substitute for the prohibition on exclusive contracts under Section 628(c)(2)(D). Among other things, the Commission noted that a non-price discrimination complaint requires an MVPD to demonstrate that the conduct was "unreasonable," which the Commission noted may be difficult to establish. We seek comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming to reliance instead on a case-by-case process, including non-price discrimination complaints.

(iii) Section 628(c)(2)(A) Undue Influence Complaints

67. We seek comment on the extent to which undue influence complaints under Section 628(c)(2)(A) may also provide some protection for competitive MVPDs should the exclusive contract prohibition sunset (wholly or partially). Section 628(c)(2)(A) precludes a cable operator that has an

²²⁰ See supra ¶ 58.

²²¹ See supra n.21.

²²² See supra ¶¶ 41-42; 2007 Extension Order, 22 FCC Rcd at 17827-29, ¶ 53 ("where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy"); id. at 17832, ¶ 58 ("Substantial increases in clustering, i.e., the number of DMAs in which homes passed by a single cable operator is a large share of total television households, would mean that withholding is likely more profitable than it was before.").

²²³ See 2002 Extension Order, 17 FCC Rcd at 12153-54, ¶ 65 n.206 ("We do not believe other provisions in the statute – namely, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) – are adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D)."); 2007 Extension Order, 22 FCC Rcd at 17796-97, ¶ 6 and 17834-35, ¶ 62 n.320.

²²⁴ See 2002 Extension Order, 17 FCC Rcd at 12153-54, ¶ 65 n.206.

²²⁵ See supra ¶ 49.

²²⁶ See 47 U.S.C. § 548(c)(2)(A).

attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from "unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated [MVPD]."227 The Commission has explained that the "concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting" and that the prohibition on undue influence "can play a supporting role where information is available (such as might come from an internal 'whistleblower') that evidences 'undue influence' between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding,"²²⁸ The Commission acknowledged that "such conduct may be difficult for the Commission or complainants to establish" but "its regulation provides a useful support for direct discrimination and contracting regulation." To what extent, if any, will the prohibition on undue influence provide some protection for competitive MVPDs should the exclusive contract prohibition sunset? If the exclusive contract prohibition were to sunset, then a cable operator would be permitted generally to enter into an exclusive contract with a satellite-delivered, cable-affiliated programming network, although the contract may be deemed to violate Section 628(b) (or, potentially, Section 628(c)(2)(B)²³⁰) after the conclusion of a complaint proceeding. In the event the exclusive contract prohibition sunsets, if a cable operator "unduly influences" a satellite-delivered, cableaffiliated programmer to enter into an exclusive contract, would that conduct violate Section 628(c)(2)(A) even though the underlying contract would be permissible (absent a finding of a violation of Section 628(b) (or, potentially, Section 628(c)(2)(B)²³¹))? Stated differently, in the event of a sunset, can a cable operator "unduly influence" a satellite-delivered, cable-affiliated programmer to enter into an exclusive contract only if the underlying contract violates Section 628(b) (or, potentially, Section 628(c)(2)(B)²³²)?

b. Relaxing the Exclusive Contract Prohibition

68. Rather than sunsetting the exclusive contract prohibition in its entirety and relying solely on existing protections provided by the program access rules that will not sunset, we seek comment on whether we should instead relax, rather than sunset, the exclusivity prohibition in the ways discussed below, or in some other way. We ask parties to comment on whether retaining the exclusivity ban in certain circumstances would be more effective in preserving and protecting competition in the video distribution market than permitting the exclusive contract prohibition to sunset entirely. In addition to the proposals below, we invite comment on other ways to relax the exclusive contract prohibition.

(i) Sunsetting the Exclusive Contract Prohibition on a Marketby-Market Basis

69. We seek comment on whether to establish a process whereby a cable operator or satellitedelivered, cable-affiliated programmer can file a Petition for Sunset seeking to remove the exclusive contract prohibition on a market-by-market basis based on the extent of competition in the market.²³³ In

²²⁷ Id.

²²⁸ 1993 Program Access Order, 8 FCC Rcd at 3424, ¶ 145.

²²⁹ Id

²³⁰ See supra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

²³¹ See id.

²³² See id.

²³³ We note that the Commission sought comment on a similar proposal in the 2007 Program Access NPRM. See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17859, ¶ 114 (2007) (seeking comment on whether the Commission can establish a procedure that would shorten the term of the exclusive contract prohibition (continued....)

the 2002 Extension Order, the Commission explained that "clustering, accompanied by an increase in vertically integrated regional programming networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."234 Moreover, as noted above, the market share held by cable operators in DMAs varies considerably, from a high in the 80 percent range to a low in the 20 percent range.²³⁵ As the Commission has explained previously, particularly "where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy."²³⁶ Moreover, in the 2007 Extension Order, the Commission provided an empirical analysis demonstrating that the profitability of withholding increases as the number of television households passed by a vertically integrated cable operator increases in a given market area, such as through clustering.²³⁷ Accordingly, a cable-affiliated programmer will have an increased incentive to enter into exclusive contracts with cable operators in those areas where the market share of competitive MVPDs is comparatively low or where its affiliated cable operator passes a large percentage of television households or where both circumstances are present.²³⁸ If there was not a blanket prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming, would incumbent cable operators and cable-affiliated programmers enter into exclusive contracts in these markets? If so, does the wide variation in cable market share and television households passed by a vertically integrated cable operator on a regional and local basis call for a more granular assessment of the continued need for an exclusive contract prohibition in individual markets, rather than a broad rule that applies to all markets equally? Would such a market-by-market assessment necessarily be based on a Commission finding that satellite-delivered, cable-affiliated programming remains necessary for competition in the video distribution market?²³⁹ That is, absent such a finding, would a market-by-market assessment approach mean that the exclusive contract prohibition would sunset only in areas where satellite-delivered, cable-affiliated programmers lack an incentive to enter into exclusive contracts, regardless of the importance of the programming at issue for competition? Is there any basis for interpreting the sunset provision in Section 628(c)(5) in this manner, which might permit exclusive contracts only when there is little possibility such contracts will exist?

²³⁴ 2002 Extension Order, 17 FCC Rcd at 12145, ¶ 47.

²³⁵ See supra ¶ 41.

²³⁶ 2007 Extension Order, 22 FCC Rcd at 17827-29, ¶ 53.

²³⁷ See id. at 17831-32, ¶¶ 56-59 and 17883-91, Appendix C.

²³⁸ See 2002 Extension Order, 17 FCC Rcd at 12140, ¶ 38 ("The number of subscribers that a vertically integrated cable programmer serves is of particular importance in calculating the benefits of withholding programming from rival MVPDs. The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal, then, as the number of subscribers rises, so does the likelihood that withholding would be profitable."); 2007 Extension Order, 22 FCC Rcd at 17832, ¶ 58 ("Substantial increases in clustering, i.e., the number of DMAs in which homes passed by a single cable operator is a large share of total television households, would mean that withholding is likely more profitable than it was before.").

²³⁹ See supra ¶¶ 33-37 (discussing the "ability" of cable-affiliated programmers to favor their affiliated cable operators, such that competition and diversity in the distribution of video programming would not be preserved and protected, and whether satellite-delivered, cable-affiliated programming remains programming that is necessary for competition).

70. To the extent we establish a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can petition to remove the exclusive contract prohibition on a market-bymarket basis, we seek comment on the details of this process. First, in assessing whether to sunset the exclusive contract prohibition in an individual market, we propose to apply the same test set forth in Section 628(c)(5) - i.e., whether the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."²⁴⁰ Who should bear the burdens of production and persuasion in demonstrating that the exclusive contract prohibition either does or does not meet this test in an individual market? While a petitioner (in this case, the cable operator or satellitedelivered, cable-affiliated programmer) might normally bear these burdens, Congress established that the exclusive contract prohibition would sunset unless it continues to be necessary pursuant to this test. The Commission has explained that Section 628(c)(5) thus "creates a presumption that the rule will sunset" unless it continues to be necessary.²⁴¹ Does this call for a regime where, in response to a petition seeking to remove the prohibition in an individual market, the burden of production shifts to competitive MVPDs and other interested parties to put forth evidence demonstrating that the prohibition continues to be necessary? To provide guidance to impacted parties, should we establish a specific benchmark which, if met, would establish a rebuttable presumption that the market is not sufficiently competitive to allow the exclusive contract prohibition to sunset? For example, should the market be rebuttably presumed to not be sufficiently competitive to allow the exclusive contract prohibition to sunset if the market share held by competitive MVPDs is below a certain threshold or television households passed by a vertically integrated cable operator is above a certain threshold?²⁴² We ask commenters to provide support for any proposed threshold. Should we instead apply the test set forth in Section 628(c)(5) on an entirely case-bycase basis, considering all of the facts and circumstances presented, without establishing a specific benchmark? Second, how should we define the "market" for purposes of these petitions? Should we establish a specific market size for purpose of the petitions (such as DMA, county, or franchise area) or should we allow petitioners to seek a sunset of the exclusive contract prohibition for any size market they choose? Third, we seek comment on procedural deadlines. Given the likely fact-intensive nature of these petitions, we propose to establish a pleading cycle that is identical to the one established for complaints involving terrestrially delivered, cable-affiliated programming. 243 Specifically, we propose to establish a 45-day opposition period and a 15-day reply period. Fourth, to the extent that the exclusive contract prohibition has not been removed in an individual market, we propose to retain our existing rules and procedures whereby a cable operator or a satellite-delivered, cable-affiliated programmer can seek prior Commission approval to enter into an exclusive contract by demonstrating that the arrangement satisfies the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules. Fifth, we seek comment on whether to adopt a sunset date for the exclusive contract prohibition, thereby eliminating the need for further market-based petitions, subject to a review by the Commission in the year

²⁴⁰ 47 U.S.C. § 548(c)(5).

²⁴¹ 2002 Extension Order, 17 FCC Rcd at 12130-31, ¶ 16.

²⁴² See infra, Appendix A (noting recent data indicating that competitive MVPDs have a nationwide market share of 44.1 percent). While the Commission has deemed certain markets as subject to "effective competition" pursuant to Section 623 of the Act, it has also explained that this test serves a limited and defined purpose and, if met, "do[es] not demonstrate that . . . this level of competition deprives cable operators of the incentive to withhold or to take other anticompetitive actions with their affiliated programming." 2010 Program Access Order, 25 FCC Rcd at 763, ¶27 n.97.

²⁴³ See 2010 Program Access Order, 25 FCC Rcd at 779-80, ¶ 49 (providing the defendant with 45 days to file an answer to a complaint alleging an "unfair act" involving terrestrially delivered, cable-affiliated programming to ensure that the defendant has adequate time to develop a response); see also 47 C.F.R. §§ 76.1001(b)(2)(i), 76.1003(f).

prior to the sunset date. Should the sunset date be five years from the current sunset date (i.e., until October 5, 2017), consistent with the two prior five-year extensions?²⁴⁴

- 71. We also seek comment on the practical effect of sunsetting the exclusive contract prohibition on a market-by-market basis. For example, to the extent that certain competitive MVPDs, such as DBS providers, market their service on a nationwide basis, how will the sunset of the exclusive contract prohibition in individuals markets impact their marketing efforts? For example, if a certain satellite-delivered, cable-affiliated programming network is available to DBS customers in some markets, but not in others due to exclusive contracts with cable operators, how burdensome will it be for DBS providers to inform subscribers and potential customers of the limited availability of this programming and to implement the selective availability of the programming? In addition to this potential concern, we seek comment on the other costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming throughout the nation to reliance instead on a market-by-market assessment.²⁴⁵
 - (ii) Retaining an Exclusive Contract Prohibition for Satellite-Delivered, Cable-Affiliated RSNs and Other Satellite-Delivered, Cable-Affiliated "Must Have" Programming
- 72. We seek comment on whether we should retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming. The Commission has previously explained that RSNs have no good substitutes, are important for competition, and are non-replicable. Moreover, in his dissenting opinion to the D.C. Circuit decision affirming the 2007 Extension Order, Judge Kavanaugh articulated the following explanation for why a ban on exclusive contracts for RSNs may be appropriate:

I would leave open the possibility that the Government might still impose a prospective ban on some exclusive agreements between video programming distributors and affiliated *regional* video programming networks, particularly regional sports networks. That is because the upstream market in which video programming distributors contract with *regional* networks is less competitive than the national market . . . [M]arket share and other relevant factors in certain areas may dictate tolerance of a narrow exclusivity ban. Situations where a highly desirable "must have" regional sports network is controlled by one video programming distributor might justify a targeted restraint on such regional exclusivity arrangements. I need not definitively address such a possibility in this case.²⁴⁷

73. We note, however, that the Commission in the 2010 Program Access Order declined to adopt a flat ban on exclusive contracts involving terrestrially delivered, cable-affiliated RSNs pursuant to Section 628(b) of the Act. 248 Noting empirical evidence that withholding of an RSN in one case did not have an impact on competition, 249 the Commission declined to adopt a general conclusion regarding

²⁴⁴ See 2002 Extension Order, 17 FCC Rcd at 12160-61, ¶¶ 79-80; 2007 Extension Order, 22 FCC Rcd at 17846, ¶ 81.

²⁴⁵ See supra ¶ 49.

 $^{^{246}}$ See supra \P 28.

²⁴⁷ Cablevision I, 597 F.3d at 1324 n.3 (Kavanaugh, J., dissenting).

 $^{^{248}}$ See 2010 Program Access Order, 25 FCC Rcd at 782-83, \P 52.

²⁴⁹ See id. at 770-71, ¶ 35 and 782-83, ¶ 52 (citing Adelphia Order, 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share, and noting that the RSN showed the games of the Charlotte Bobcats, a relatively (continued....)

RSNs, adopting instead a case-by-case approach, albeit with a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). The Commission explained that "case-by-case consideration of the impact on competition in the video distribution market is necessary to address whether unfair practices significantly hinder competition in particular cases." 251

- Are there legal and/or policy reasons why the Commission may want to establish a caseby-case approach for assessing exclusive contracts involving terrestrially delivered, cable-affiliated RSNs, but to retain an across-the-board prohibition on exclusive contracts involving satellite-delivered, cableaffiliated RSNs? We note that, in adopting a case-by-case approach for terrestrially delivered, cableaffiliated RSNs, the Commission was applying and interpreting Section 628(b) of the Act, which prohibits "unfair acts" that have the "purpose or effect" to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²⁵² In considering a sunset of the exclusive contract prohibition, however, we are applying and interpreting Section 628(c)(5) of the Act, which requires the Commission to determine whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."²⁵³ Unlike Section 628(b), the language in Section 628(c)(5) does not require the Commission to assess whether particular exclusive contracts are "unfair" or whether they have the "purpose or effect" to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. We note that two vertically integrated cable operators, Comcast and Cablevision, previously stated before the D.C. Circuit that a partial sunset of the exclusive contract prohibition is a legally permissible approach, explaining that "Section 628(c)(5) grants the FCC additional sunsetting authority, and nothing in the statute suggests that the FCC must do so on an all-or-nothing basis."254 Does this difference in statutory language provide a basis for treating satellite-delivered, cable-affiliated RSNs differently from terrestrially delivered, cable-affiliated RSNs? In addition, are there policy reasons why the Commission may want to retain the exclusivity ban as it applies to satellite-delivered, cable-affiliated RSNs? If so, we propose to define the term "RSN" in the same way the Commission defined that term in the 2010 Program Access Order.255
- 75. To the extent we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs, we propose to retain our existing rules and procedures whereby a cable operator or a satellite-delivered, cable-affiliated programmer can file a Petition for Exclusivity seeking prior Commission approval to enter into an exclusive contract by demonstrating that the arrangement satisfies the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules. We seek comment on whether this process is sufficient for addressing those instances where an exclusive contract pertaining to a satellite-delivered, cable-affiliated RSN might serve the public interest. (Continued from previous page)

new team that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs)).

²⁵⁰ See id.

 $^{^{251}}$ Id. at 770-71, ¶ 35; see id. (concluding that "significant hindrance" under Section 628(b) will not result in every case of RSN withholding).

²⁵² 47 U.S.C. § 548(b).

²⁵³ 47 U.S.C. § 548(c)(5).

²⁵⁴ Brief of Cablevision Systems Corporation and Comcast Corporation, Nos. 07-1425, 07-1487 (Oct. 8, 2008), at 64.

²⁵⁵ See supra n.99.

²⁵⁶ See supra ¶ 8.

We note that, if we were to retain an exclusive contract prohibition for only satellite-delivered, cable-affiliated RSNs, our rules would apply burdens to different parties depending on whether or not the programming subject to an exclusive contract is an RSN: (i) in the case of satellite-delivered, cable-affiliated RSNs, exclusive contracts with cable operators would be generally prohibited, unless a cable operator or RSN can satisfy its burden of demonstrating that an exclusive contract serves the public interest based on the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules; and (ii) in the case of all other satellite-delivered, cable-affiliated programming, exclusive contracts with cable operators would be generally permitted, unless an MVPD can satisfy its burden of demonstrating that the exclusive contract violates Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules (or, potentially, Section 628(c)(2)(B) of the Act and Section 76.1002(b) of the Commission's rules (SNs for competition, as well as their non-substitutability and non-replicability, we believe there is a sufficient basis for drawing this distinction between RSN and non-RSN programming. We seek comment on this view.

RSNs that can be deemed "must have" and for which we should retain the exclusivity prohibition? We note that the Commission in the Comcast-NBCU Order concluded that "certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming." Are there other types of satellitedelivered, cable-affiliated programming besides RSNs that have no good substitutes, are important for competition, and are non-replicable, as the Commission has found with respect to RSNs? To the extent that commenters contend that there are, we ask that they provide reliable, empirical data supporting their positions, rather than merely labeling such programming as "must have." In addition, we request commenters to provide a rational and workable definition of such programming that can be applied objectively. We note that in the 2007 Extension Order the Commission declined to differentiate between categories of programming for purposes of the exclusive contract prohibition for a number of legal and policy reasons. We seek comment on whether any of the concerns the Commission expressed in the 2007 Extension Order should prevent us from retaining an exclusive contract prohibition for satellite-

²⁵⁷ See supra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

²⁵⁸ See supra ¶¶ 28, 53; see also Cablevision II, 649 F.3d at 717 ("[T]he Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market.").

²⁵⁹ Comcast/NBCU Order, 26 FCC Rcd at 4258, ¶ 46.

²⁶⁰ See supra ¶ 28.

These reasons were as follows: (i) Congress did not distinguish between different types of satellite-delivered, cable-affiliated programming in adopting the exclusive contract prohibition in Section 628(c)(2)(D) (see 2007 Extension Order, 22 FCC Rcd at 17839-40, ¶ 69; see also 2002 Extension Order, 17 FCC Rcd at 12156, ¶ 69); (ii) requests to relieve satellite-delivered, cable-affiliated programming networks from the exclusive contract prohibition can be addressed through individual exclusivity petitions satisfying the factors set forth in Section 628(c)(4) (see 2007 Extension Order, 22 FCC Rcd at 17839-40, ¶ 69); (iii) no commenter provided a rational and workable definition of "must have" programming that would allow the Commission to apply the exclusive contract prohibition to only this type of programming (see id.); (iv) the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition (see id.; see also 2002 Extension Order, 17 FCC Rcd at 12156, ¶ 69); and (v) distinguishing between different types of satellite-delivered, cable-affiliated programming might raise First Amendment concerns (see 2007 Extension Order, 22 FCC Rcd at 17839-40, ¶ 69; see also 2002 Extension Order, 17 FCC Rcd at 12156, ¶ 69).

delivered, cable-affiliated RSNs, or potentially other satellite-delivered, cable-affiliated "must have" programming, given the state of the market today.

77. With respect to First Amendment concerns, we note that the Commission in the 2010 Program Access Order applied a rebuttable presumption of significant hindrance to one category of programming – terrestrially delivered, cable-affiliated RSNs.²⁶² The D.C. Circuit rejected claims that this was a content-based restriction on speech subject to strict scrutiny, explaining that:

[T]here is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas. The clear and undisputed evidence shows that the Commission established presumptions for RSN programming due to that programming's economic characteristics, not to its communicative impact. Thus content-neutral, the presumptions are subject only to intermediate scrutiny. 263

In applying intermediate scrutiny, the D.C. Circuit ruled that, "[g]iven record evidence demonstrating the significant impact of RSN programming withholding, the Commission's presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming."²⁶⁴ Based on the D.C. Circuit's decision, we do not believe that retaining an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming would run afoul of the First Amendment. We seek comment on this view.

- 78. To the extent we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, we propose to apply the prohibition independently to the SD and HD versions of the same network. As discussed above, the Commission has concluded that HD programming is growing in significance to consumers and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content. Accordingly, the Commission has determined that it will analyze the HD version of a network separately from the SD version with similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b). Because this same finding would appear to apply to an exclusive contract prohibition, we propose that, if a satellite-delivered, cable-affiliated programmer makes the SD version of an RSN or other "must have" programming available to MVPDs, this would not exempt the satellite-delivered, HD version of the RSN or other "must have" programming from the exclusive contract prohibition. We seek comment on this view.
- 79. To the extent we retain an exclusive contract prohibition pursuant to Section 628(c)(5) only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, should we adopt a date when this prohibition will sunset, subject to a review by the

²⁶² See supra ¶ 53.

²⁶³ Cablevision II, 649 F.3d at 717-18 (citations omitted).

²⁶⁴ TA

²⁶⁵ See 2010 Program Access Order, 25 FCC Rcd at 784-85, ¶ 54.

²⁶⁶ See id. at 784-85, ¶¶ 54-55.

²⁶⁷ See id. at 784-85, ¶ 54.

Commission in the year prior to the sunset date? Should the sunset date be five years from the current sunset date (i.e., until October 5, 2017), consistent with the two prior five-year extensions?²⁶⁸

80. Should we combine the two approaches to partial sunsetting of the exclusive contract prohibition, by adopting a market-by-market approach²⁶⁹ and also retaining the prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming? If so, how should the two approaches interrelate? If the exclusive contract prohibition sunsets in a specific market, should this sunset also apply to satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming? Or, given the critical nature of RSNs and other "must have" programming for competition, should the exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming continue to apply even if the exclusive contract prohibition sunsets for other satellite-delivered, cable-affiliated programming in the market? Should the Commission instead assess whether the exclusive contract prohibition should continue to apply to satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming on a market-by-market basis, considering all of the facts and circumstances presented in the petition?

5. Implementation of a Sunset in a Manner that Minimizes Any Potential Disruption for Consumers

Whether we retain, sunset, or relax the exclusive contract prohibition, our goal is protect 81. consumers and minimize any potential disruption. As an initial matter, as noted above, 270 many Comcastaffiliated networks are subject to program access conditions adopted in the Comcast/NBCU Order and will continue to be subject to these conditions for six more years (until January 2018, assuming they are not modified earlier in response to a petition²⁷¹). These networks will not be impacted by a sunset (complete or partial). With respect to other satellite-delivered, cable-affiliated networks, we seek comment below on how sunsetting the exclusive contract prohibition (wholly or partially) will impact consumers, and whether a phased implementation of a sunset is necessary to minimize any potential disruption to consumers. As discussed above, to the extent the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment above on sunsetting or relaxing the prohibition. To the extent the prohibition sunsets (wholly or partially), we envision that there are at least two possible scenarios with respect to existing affiliation agreements. We seek comment on which scenario is more likely and if there are any other likely scenarios. First, if the exclusive contract prohibition were to sunset, an existing affiliation agreement between a cable-affiliated programmer and an MVPD pertaining to a satellite-delivered, cable-affiliated programming network might allow the programmer to terminate or modify the existing agreement immediately on the effective date of the sunset and to instead enter into an exclusive contract with a cable operator. Second, even if the exclusive contract prohibition were to sunset, an existing affiliation agreement might require the satellite-delivered, cable-affiliated programmer to continue to provide the programming to the MVPD for the duration of the term of the affiliation agreement despite the sunset. We seek comment on these alternative scenarios below.

a. Termination or Modification of Affiliation Agreements on the Effective Date of the Sunset

82. To the extent that existing affiliation agreements permit satellite-delivered, cable-affiliated programmers to terminate or modify the agreements immediately on the effective date of the

²⁶⁸ See 2002 Extension Order, 17 FCC Rcd at 12160-61, ¶¶ 79-80; 2007 Extension Order, 22 FCC Rcd at 17846, ¶ 81.

²⁶⁹ See supra ¶¶ 69-71.

²⁷⁰ See supra ¶ 26.

²⁷¹ See supra n.90.

sunset and to instead enter into an exclusive contract with a cable operator, is there any basis to expect that many satellite-delivered, cable-affiliated programmers would terminate or modify existing agreements simultaneously and thereby cause significant disruption to consumers by depriving them of programming they have come to expect? Are our existing rules sufficient to prevent any customer disruption? For example, to the extent that a cable-affiliated programmer terminates or modifies an existing affiliation agreement with an MVPD pertaining to a satellite-delivered, cable-affiliated programming network and instead enters into an exclusive arrangement with a cable operator, the MVPD could file a complaint alleging a violation of Section 628(b) of the Act²⁷² (and, potentially, Section 628(c)(2)(B) of the Act²⁷³). While our program access rules contain specific procedures for the filing of a petition for a standstill along with a program access complaint when seeking to renew an existing affiliation agreement,²⁷⁴ should our standstill procedures also apply when an MVPD files a program access complaint based on a satellite-delivered, cable-affiliated programmer's mid-term termination or modification of an affiliation agreement resulting from the sunset? If the standstill petition is granted, the price, terms, and other conditions of the existing affiliation agreement will remain in place pending resolution of the program access complaint, thereby reducing consumer disruption.

Rather than relying on the complaint and standstill process, should we instead abrogate provisions of affiliation agreements that would allow satellite-delivered, cable-affiliated programmers to terminate or modify their existing agreements with MVPDs immediately on the effective date of the sunset? We seek comment regarding the benefits and burdens of abrogating contractual provisions that otherwise would permit a programmer to terminate or modify its existing agreement with an unaffiliated MVPD immediately upon sunset of the exclusive contract prohibition. 275 We seek comment regarding how the abrogation of such contractual provisions would be congruous with a possible finding to sunset the exclusive contract prohibition. In NCTA v. FCC, the D.C. Circuit upheld the Commission's abrogation of existing contracts in the program access context. 276 Alternatively, to minimize any potential disruption to consumers, should we adopt a phased implementation of the sunset? For example, should we provide that, for a period of three years from the sunset date, a cable-affiliated programmer cannot enter into an exclusive contract with a cable operator for a satellite-delivered, cable-affiliated programming network that is an RSN (assuming the prohibition is not retained for RSNs) or is ranked within the Top 20 cable networks as measured by either prime time ratings, average all-day ratings, or total number of subscribers? Should we adopt a similar restriction, for a period of two years from the sunset date, for a satellite-delivered, cable-affiliated programming network that is ranked within the Top 21-50 cable networks? We seek comment on these proposals and any other appropriate ways to minimize any disruption to consumers resulting from the sunset in the event that existing affiliation agreements permit satellite-delivered, cable-affiliated programmers to terminate or modify them on the effective date of the sunset.

b. Continued Enforcement of Existing Affiliation Agreements Despite the Sunset

84. To the extent that existing affiliation agreements require cable-affiliated programmers to continue to provide satellite-delivered, cable-affiliated programming networks to MVPDs for the duration

²⁷² See supra ¶¶ 48-57.

²⁷³ See supra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

²⁷⁴ See 47 C.F.R. § 76.1003(1).

²⁷⁵See Nat'l Cable & Telecomm. Ass'n v. FCC, 567 F.3d 659, 670-71 (D.C. Cir. 2009).

²⁷⁶ See id.

of the term of the existing agreement despite the sunset of the exclusive contract prohibition, we seek comment on the interplay between the sunset and the discrimination provision of the program access rules. For example, assume that a cable-affiliated programmer has existing affiliation agreements for a satellite-delivered, cable-affiliated programming network with three MVPDs (including one cable operator) subject to the following termination dates: December 31, 2012 (cable operator); December 31, 2013 (MVPD A); December 31, 2014 (MVPD B). If the satellite-delivered, cable-affiliated programmer enters into an exclusive contract with the cable operator after its current agreement expires on December 31, 2012, would the satellite-delivered, cable-affiliated programmer be required to make the programming available to all MVPDs until after the expiration of the latest-expiring affiliation agreement with an MVPD other than the cable operator that is a party to the exclusive contract? We seek comment on whether it would be impermissibly discriminatory in violation of Section 628(c)(2)(B) if the satellitedelivered, cable-affiliated programmer were to refuse to license the network to MVPD A after December 31, 2013, while continuing to provide the programming to MVPD B until its agreement expires on December 31, 2014, based on the future enforcement of an exclusive contract with the cable operator as of January 1, 2015, after the expiration of the agreement with MVPD B. 277 While the satellite-delivered, cable-affiliated programmer's discriminatory treatment of MVPD A relative to MVPD B and the cable operator during the period of December 31, 2013 to December 31, 2014 might be justified based on a legitimate business reason, is the future enforcement of an exclusive contract a legitimate business reason for such discriminatory conduct? If not, then the satellite-delivered, cable-affiliated programmer would not be permitted to have the exclusivity period with the cable operator begin, or to refuse to license the programming to other MVPDs, until all affiliation agreements with other MVPDs expire. Thus, in this scenario, absent a legitimate business reason, the satellite-delivered, cable-affiliated programmer would be required to enter into an affiliation agreement with MVPD A that terminates no earlier than December 31, 2014 (i.e., the expiration of the latest-expiring affiliation agreement with an MVPD other than the cable operator that is a party to the exclusive contract). We seek comment on this view.

85. To the extent that affiliation agreements require cable-affiliated programmers to continue to provide satellite-delivered, cable-affiliated programming networks to MVPDs for the duration of the term of the existing agreement despite the sunset, does the anti-discrimination provision of Section 628(c)(2)(B) as described here prevent the enforcement of any exclusive contract until the expiration of the latest-expiring affiliation agreement with an MVPD other than the cable operator that is a party to the exclusive contract? Will this limit the immediate impact of the sunset (complete or partial) and help to minimize any potential disruption to consumers? What impact, if any, does Section 628(c)(2)(B)(iv) have on this discussion?²⁷⁸ Even if this section could be read to immunize post-sunset exclusive contracts from being challenged as impermissibly discriminatory in violation of Section 628(c)(2)(B), would this provision allow a satellite-delivered, cable-affiliated programmer to selectively refuse to license programming to certain MVPDs based on future enforcement of an exclusive contract, as described here?²⁷⁹

To be sure, regardless of whether the market includes MVPD B, MVPD A might also challenge the exclusive contract pursuant to Section 628(b) (see supra ¶¶ 48-57) or, potentially, Section 628(c)(2)(B) as an unreasonable refusal to license (see supra ¶¶ 59-63).

²⁷⁸ See supra ¶ 61; 47 U.S.C. § 548(c)(2)(B)(iv) (providing that the anti-discrimination provision of Section 628(c)(2)(B) of the Act does not prohibit a satellite-delivered, cable-affiliated programmer from "entering into an exclusive contract that is permitted under [Section 628(c)(2)(D)]").

²⁷⁹ See supra ¶ 84.

6. First Amendment

- 86. We ask commenters to consider carefully how the First Amendment impacts our review of the exclusive contract prohibition, including the proposals to relax the prohibition. As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the program access provisions, these provisions will survive intermediate scrutiny if they "further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Given the current state of competition in the video programming market and the video distribution market, does the First Amendment require the exclusive contract prohibition as it exists today to sunset or to be relaxed? Is a prohibition on all exclusive contracts in all markets between cable operators and cable-affiliated programmers pertaining to satellite-delivered, cable-affiliated programming "no greater than is essential" to the furtherance of the substantial government interest in promoting competition in the MVPD market? Would retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, and/or allowing the prohibition to sunset on a market-by-market basis, be a sufficiently tailored approach?
- 87. We note that, in rejecting a facial First Amendment challenge to the 2010 Program Access Order in which the Commission adopted a case-by-case approach for considering unfair acts involving terrestrially delivered, cable-affiliated programming, the D.C. Circuit explained that, "[b]y imposing liability only when complainants demonstrate that a company's unfair act has 'the purpose or effect' of 'hinder[ing] significantly or . . . prevent[ing]' the provision of satellite programming, . . . the Commission's terrestrial programming rules specifically target activities where the governmental interest is greatest." Moreover, the D.C. Circuit stated that the Commission, in adopting this case-by-case approach, "has no obligation to establish that vertically integrated cable companies retain a stranglehold on competition nationally or that all withholding of terrestrially delivered programming negatively affects competition."²⁸³ Is a case-by-case approach pursuant to Section 628(b) (and, potentially, Section 628(c)(2)(B)²⁸⁴) or a narrowed application of the exclusive contract prohibition as discussed above, rather than the current broad, prophylactic prohibition, preferable under the First Amendment given the competitive environment today? We also seek comment on the First Amendment implications of a phased implementation of a sunset as discussed above to minimize any potential disruption to consumers.²⁸⁵

²⁸⁰ See supra Section III.A.4.b.

²⁸¹ Time Warner, 93 F.3d at 978 (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

²⁸² Cablevision II, 649 F.3d at 711-12 (quoting 47 U.S.C. § 548(b)).

²⁸³ Id. at 12.

²⁸⁴ See supra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

²⁸⁵ See supra ¶¶ 82-83.

7. Costs and Benefits

In addition to the specific questions noted above, ²⁸⁶ we ask commenters to consider 88. generally the costs and benefits associated with either retaining, sunsetting, or relaxing the exclusive contract prohibition as described herein. We believe that retaining the exclusive contract prohibition in its entirety as it exists today will result in certain costs, such as unnecessarily restricting procompetitive arrangements that in certain instances may foster competition in the video distribution market and promote competition and diversity in the video programming market.²⁸⁷ While a case-by-case approach, either pursuant to a Section 628(b) complaint (and, potentially, a Section 628(c)(2)(B) complaint (288) or a market-based petition, will better enable the Commission to consider the unique facts and circumstances presented in each case, this approach will also result in certain costs by requiring the affected parties and the Commission to expend resources litigating and resolving the complaints and petitions. 289 Retaining an exclusive contract prohibition for programming that is demonstrated to be important for competition, nonreplicable, and without good substitutes (i.e., satellite-delivered, cable-affiliated RSNs and other satellitedelivered, cable-affiliated "must have" programming), 290 may help to reduce these costs by eliminating the need to file complaints with respect to this class of programming. To the extent possible, we encourage commenters to quantify the costs and benefits of the different approaches to the exclusive contract prohibition as described herein. Which of the approaches would be most beneficial to the public? When would the public realize these benefits? Which of these approaches would be least burdensome?

8. Subdistribution Agreements

89. We seek comment on the impact of a sunset (complete or partial) of the exclusive contract prohibition on the Commission's rules pertaining to exclusive subdistribution agreements. ²⁹¹ The Commission's rules define a subdistribution agreement as "an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or satellite broadcast programming

²⁸⁶ See supra ¶ 49 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts as it exists today to reliance instead on a case-by-case process, including Section 628(b) complaints); ¶ 57 (seeking comment on the costs and benefits of retaining, after a sunset, the existing process whereby a cable operator or a satellite-delivered, cable-affiliated programmer may seek Commission approval for an exclusive contract by demonstrating that the arrangement serves the public interest); ¶ 66 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts as it exists today to reliance instead on a case-by-case process, including non-price discrimination complaints); ¶ 71 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts throughout the nation as it exists today to reliance instead on a market-by-market assessment).

²⁸⁷ See 2007 Extension Order, 22 FCC Rcd at 17835, ¶ 63 ("We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors."); see supra ¶¶ 44-45 (discussing the impact of the exclusive contract prohibition in the video programming market).

²⁸⁸ See supra ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

²⁸⁹ See supra ¶ 55 (acknowledging that a case-by-case complaint process for addressing exclusive contracts involving satellite-delivered, cable-affiliated, national programming networks may be burdensome for litigants and the Commission, especially in comparison to the current broad, prophylactic prohibition).

²⁹⁰ See supra ¶¶ 72-80 (seeking comment on whether to retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming).

²⁹¹ See 47 C.F.R. § 76.1002(c)(3); see also 1993 Program Access Order, 8 FCC Rcd at 3387-88, ¶¶ 68-70; 1994 Program Access Order, 10 FCC Rcd at 1941-44, ¶¶ 89-92.

vendor to distribute the vendor's programming to competing multichannel video programming distributors." Based on the exclusive contract prohibition, the Commission in the 1993 Program Access Order adopted certain restrictions on exclusive subdistribution agreements to "address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights" and to ensure "appropriate safeguards to limit the potential for anticompetitive behavior." Specifically, a cable operator engaged in subdistribution (i) may not require a competing MVPD to purchase additional or unrelated programming as a condition of such subdistribution; (ii) may not require a competing MVPD to provide access to private property in exchange for access to programming; (iii) may not charge a competing MVPD more for programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge; and (iv) must respond to a request for access to such programming by a competing MVPD within fifteen (15) days of the request and, if the request is denied, the competing MVPD must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor. We propose to eliminate these restrictions to the extent the exclusive contract prohibition sunsets and seek comment on this proposal. (298)

9. Common Carriers and Open Video Systems

90. The Commission's rules contain provisions pertaining to exclusive contracts involving common carriers and OVS in served areas that mirror the rules applicable to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas. With respect to common carriers, these rules pertain to exclusive contracts between a satellite-delivered, common-carrier-affiliated programmer and a common carrier or its affiliate that provides video programming by any means directly to subscribers. With respect to OVS, these rules pertain to exclusive contracts (i) between a satellite-delivered, OVS-affiliated programmer and an OVS or its affiliate that provides video programming on its OVS; and (ii) between a satellite-delivered, cable-affiliated programmer and an OVS video programming provider in which a cable operator has an attributable interest.

²⁹² 47 C.F.R. § 76.1000(k).

²⁹³ 1993 Program Access Order, 8 FCC Rcd at 3387-88, ¶ 68; see 1994 Program Access Order, 10 FCC Rcd at 1943-44, ¶ 92 (explaining that the Commission's concerns were limited to exclusive, rather than nonexclusive, subdistribution agreements).

²⁹⁴ See 47 C.F.R. § 76.1002(c)(3)(ii)(A).

²⁹⁵ See 47 C.F.R. § 76.1002(c)(3)(ii)(B).

²⁹⁶ See id.

²⁹⁷ See id.

We note that certain amendments to Section 76.1002(c)(3) pertaining to exclusive subdistribution agreements that were adopted in the 1994 Program Access Order and subsequently published in the Federal Register are not reflected in the Code of Federal Regulations. Compare 1994 Program Access Order, 10 FCC Rcd at 1955, Appendix A (showing adopted amendments to Section 76.1002(c)(3)) and Cable Television Act of 1992—Program Distribution and Carriage Agreements, 59 FR 66255 (Dec. 23, 1994) (publishing adopted amendments to Section 76.1002(c)(3) in the Federal Register) with 47 C.F.R. § 76.1002(c)(3). We intend to conform this rule as amended in this proceeding to the amendments previously adopted in the 1994 Program Access Order.

²⁹⁹ See 47 C.F.R. § 76.1004; 47 C.F.R. § 76.1507(a)-(b).

³⁰⁰ See 47 C.F.R. § 76.1004; see also 47 U.S.C. § 548(j).

³⁰¹ See 47 C.F.R. § 76.1507(a)(2), (a)(3)(ii); 1996 OVS Order, 11 FCC Rcd at 18315-18, ¶¶ 175-180.

³⁰² See 47 C.F.R. § 76.1507(b)(2); 1996 OVS Order, 11 FCC Rcd at 18317-24, ¶¶ 181-194; Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20299-302, ¶¶ 168-174 (1996).

that any amendments we adopt herein to our rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to these rules pertaining to common carriers and OVS. We also propose to conform the rules pertaining to exclusive subdistribution agreements involving OVS to the rules applicable to cable operators and seek comment on this proposal.³⁰³

10. Impact of a Sunset on Existing Merger Conditions

91. We believe that conditions adopted in two previous merger orders may be impacted if the exclusive contract prohibition were to sunset (wholly or partially). We seek comment on this impact below.

a. Adelphia Order Merger Conditions

- 92. Pursuant to merger conditions adopted in the *Adelphia Order*, certain terrestrially delivered RSNs ("Covered RSNs") affiliated with TWC are currently required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming, including the exclusive contract prohibition.³⁰⁴ Among other things, the conditions state as follows with respect to exclusivity (the "exclusivity conditions"):
 - (i) "Time Warner [Cable], and [its] existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any MVPD, and . . . Time Warner [Cable], and [its] Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis . . .":³⁰⁵
 - (ii) "Time Warner [Cable] will not enter into an exclusive distribution arrangement with any such Covered RSN, regardless of the means of delivery"; 306 and
 - (iii) "Th[is] exclusive contracts and practices . . . requirement of the program access rules will apply to Time Warner [Cable] and [its] Covered RSNs for six

³⁰³ The Commission's rules pertaining to exclusive subdistribution agreements involving OVS were adopted in 1996. See 1996 OVS Order, 11 FCC Rcd at 18372-74, Appendix A. These rules, however, do not reflect amendments the Commission made to its rules pertaining to exclusive subdistribution agreements involving cable operators adopted in the 1994 Program Access Order. See 1994 Program Access Order, 10 FCC Rcd at 1955, Appendix A (showing adopted amendments to Section 76.1002(c)(3)).

³⁰⁴ See Adelphia Order, 21 FCC Rcd at 8274, ¶¶ 156-157 (requiring terrestrially delivered RSNs in which Time Warner has or acquires an attributable interest to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming, citing 47 C.F.R. § 76.1002), 8276, ¶ 162, and 8336, Appendix B, § B.1 (citing 47 C.F.R. § 76.1002); see also Time Warner Order, 24 FCC Rcd at 893, ¶ 26 (approving transaction separating Time Warner from TWC and explaining that the Adelphia Order program access conditions will continue to apply to TWC post-restructuring but will no longer apply to Time Warner). An RSN as defined in the Adelphia Order is "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." Adelphia Order, 21 FCC Rcd at 8336, Appendix B, § A. While these conditions originally applied to Comcast as well, they were superseded by the Comcast/NBCU Order. See Comcast/NBCU Order, 26 FCC Rcd at 4364, Appendix A, Condition VI.

³⁰⁵ See Adelphia Order, 21 FCC Rcd at 8336, Appendix B, § B.1.a.

³⁰⁶ See id. at 8336, Appendix B, § B.1.b.